

HON. FRANKLIN D. BURGESS

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL MARTINEZ,

Plaintiff,

vs.

HELEN MARTINEZ, and

THE SUQUAMISH TRIBE,

Defendants

Case No.: C08-5503 FDB

PLAINTIFF'S BRIEF OPPOSING
MOTION TO DISMISS

I.

INTRODUCTION AND RELIEF REQUESTED

Plaintiff, DANIEL MARTINEZ, requests the Court Deny Defendants'
Motions to Dismiss the Complaint for Declaratory and Injunctive Relief.

II

Plaintiff's Brief Opposing Motion to Dismiss

- 1

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STATEMENT OF FACTS

Except as noted below, Plaintiff does not dispute the facts asserted by defendants in their Motions to Dismiss:

Neither Mr. nor Ms. Martinez are members of the Suquamish Tribe; nor are their children. Ms. Martinez is a Native American member of the Savoonga Tribe in Alaska. Mr. Martinez is not Indian.

At all times material hereto, the parties lived on the Port Madison (Suquamish) Indian Reservation.

On February 28, 2008, Ms. Martinez filed a Petition for Domestic Violence Protection Order in Suquamish Tribal Court (Plaintiff's Exhibit E); and obtained an Ex Parte Protection Order. Mr. Martinez appeared at the hearing on March 28, 2008. The Tribal Court granted a 5 year Protection Order; prohibiting Mr. Martinez from contacting his wife or children. Mr. Martinez did not appeal.¹

¹ It is not clear if Mr. Martinez ever received the DV Petition. The Court Clerk's Declaration states that Mr. Martinez was served with the Temporary Order (Declaration of Marilyn Kay, paragraph 5). The Declaration of Service states that only the Temporary Plaintiff's Brief Opposing Motion to Dismiss

1 On March 4, 2008, Ms. Martinez filed a Petition for Dissolution of
2 Marriage in Suquamish Tribal Court; to which Mr. Martinez also responded.
3 On 4/28/08, the Tribal Court entered a Temporary Order regarding
4 payment of bills. There have been no other hearings in the Dissolution. A
5 trial date of October 6, 2008 was continued, on Ms. Martinez' motion. Trial
6 is currently set for February 27, 2009.
7

8 It is undisputed that Mr. Martinez filed a Petition for Domestic
9 Violence Protection Order against Ms. Martinez, in Suquamish Tribal Court
10 in July, 2007. After obtaining an Ex Parte Temporary Protection Order, the
11 Petition was dismissed less than a month later, before a hearing on the
12 Petition was held.²
13
14
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16
17

18 Order was served. Plaintiff's Exhibit F In addition, Ms. Kay's Declaration does not claim
19 that Mr. Martinez was ever served with the Petition.

20 ² The Court Clerk's Declaration erroneously states that the Order of Dismissal was
21 entered on 8/16/07. Declaration of Marilyn Kay, paragraph 21. However, Defendants'
22 Exhibit D shows the Order of Dismissal was entered on 8/9/07 – the date set for the DV
23 hearing. Defendants' Exhibit C

24 Plaintiff's Brief Opposing Motion to Dismiss

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1 It is also undisputed that Ms. Martinez filed a Petition for Dissolution
2 in 2007 in Suquamish Tribal Court.³ Nor is it disputed that Ms. Martinez
3 dismissed that action.⁴

4 Additional Facts:

5
6 Though Mr. Martinez was arrested on February 27, 2008, based on
7 Ms. Martinez' allegation of Domestic Violence, he was released the next
8 day; and was never charged. Declaration of Daniel Martinez, par. 10.

9
10 Though Mr. Martinez was charged in Kitsap County District Court with
11 violating the March 27, 2008 Protection Order on April 2, 2008, the District
12 Court initially declined to find Probable Cause for that charge. Plaintiff's
13 Motion to Dismiss that charge, based on the Suquamish Tribe's lack of
14 subject matter jurisdiction, is set to be heard December 10, 2008.

15
16 Declaration of Daniel Martinez, par. 14, and Plaintiff's Exhibit C
17
18
19

20 ³ Once again, there is no evidence (even in the Court Clerk's Declaration) that Mr.
21 Martinez was ever served with a Summons and Petition in that action.

22 ⁴ It is disputed that Mr. Martinez appeared or responded to the first Dissolution. The
23 order of Dismissal was presented only by Ms. Martinez. Plaintiff's Exhibit G

1 Plaintiff's counsel requested, in writing, a copy of the record of the
2 Domestic Violence case, in order to determine whether grounds existed to
3 bring a Motion for Relief of Judgment under FRCP 60, and to obtain
4 impeachment evidence. Plaintiff's Exhibit A This request was denied by the
5 Court Clerk, at the direction of the Tribe's Chief Judge; indicating the case
6 was closed. Plaintiff's Exhibit B

8 The office of Plaintiff's attorney had previously sought dismissal of a
9 Domestic Violence Petition, filed in Suquamish Tribal Court; based on lack
10 of subject matter jurisdiction. The motion was denied. Declaration of Alton
11 B. McFadden II, par. 5

13 Plaintiff's counsel recently attempted to nonsuit a Domestic Violence,
14 pursuant to FRCP 41(a), Petition and Petition for Residential Schedule filed
15 by a non-indian in Suquamish Tribal Court. The Tribal court declined to
16 honor the Petitioner's Notice of Dismissal in both cases; ruling that it had
17 subject matter jurisdiction. Declaration of Steven L. Olsen, par. 7 & 8

19 The Martinezes resided on fee land, owned by Mr. Martinez' brother;
20 a non Indian. The alleged Domestic Violence was alleged to have occurred
21 on that property. Declaration of Daniel Martinez, par. 5, 6, 8 and 11

24 Plaintiff's Brief Opposing Motion to Dismiss

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1 Mr. Martinez has commenced his own Divorce case in Kitsap County
 2 Superior Court. Ms. Martinez has been served; but has not responded –
 3 except for a limited Notice of Appearance.

4 III

5 ARGUMENT AND AUTHORITY

6 A. THE TRIBAL COURT LACKS SUBJECT MATTER

7 JURISDICTION IN CIVIL CASES BETWEEN NON-MEMBERS

8 For over 30 years, it has been established law that Tribal Courts lack
 9 criminal jurisdiction over non- Indians. *Oliphant v. Suquamish Indian Tribe*,
 10 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978)⁵

11 In 1990, the Supreme Court clarified that its holding in *Oliphant* also
 12 applied to Indian non-members. *Duro v. Reina*, 495 U.S. 676, 110 S.Ct.
 13 2053, 109 L.Ed.2d 693 (1990)⁶.

14
15
16
17
18
19
20 ⁵ Rather than exhaust Tribal Court remedies, Oliphant and Belgarde obtained federal
 21 writs of habeas corpus after their arrests.

22 ⁶ Duro also failed to exhaust Tribal Court remedies; obtaining a writ of habeas corpus
 23 after the Tribal Court denied his motion to dismiss

1 "A basic attribute of full territorial sovereignty is the power to enforce
 2 laws against all who come within the sovereign's territory, whether citizens
 3 or aliens. *Oliphant* recognized that the tribes can no longer be described as
 4 sovereigns in this sense. Rather, as our discussion in *Wheeler* reveals, the
 5 retained sovereignty of the tribes is that needed to control their own internal
 6 relations, and to preserve their own unique customs and social order. The
 7 power of a tribe to prescribe and enforce rules of conduct for its own
 8 members "does not fall within that part of sovereignty which the Indians
 9 implicitly lost by virtue of their dependent status. The areas in which such
 10 implicit divestiture of sovereignty has been held to have occurred are those
 11 involving the relations between an Indian tribe and nonmembers of the
 12 tribe." 435 U.S. at 326."

13 *Duro, supra*, 495 U. S. 686, citing *United States v. Wheeler*, 435 U. S. 313,
 14 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978) (1978),

15 In response to *Duro*, Congress amended the Indian Civil Rights Act of
 16 1968.⁷ This amendment, commonly called the "*Duro* fix", was held to
 17 confirm a tribe's power to criminally prosecute Indian nonmembers for
 18 crimes committed within the tribe's reservation. *United States v. Lara*, 541
 19 U.S. 193, 124 S.Ct. 1628, 158 L.Ed.2d 420 (2004). The *Lara* Court noted

20 ⁷ "[P]owers of self-government' means and includes all governmental powers
 21 possessed by an Indian tribe, executive, legislative, and judicial, and all offices, bodies,
 22 and tribunals by and through which they are executed, including courts of Indian
 23 offenses; and means the inherent power of Indian tribes, hereby recognized and
 24 affirmed, to exercise criminal jurisdiction over all Indians." 25 U.S.C. 1302(2) (*emphasis*
 25 *added*)

1 "that the power to prosecute nonmembers was an aspect of the
2 tribes' external relations and hence part of the tribal sovereignty that was
divested by treaties and by Congress."

3 However, Congress could modify or adjust the tribes' status.

4
5 *Duro* concluded "that a tribe does not possess the inherent power to
6 prosecute a non-member." 541 U.S. at 205. This was changed by the
7 congressional amendment.
8

9 Congress could have, but didn't, provide in the "*Duro* fix" that tribes
10 had the inherent power to exercise civil jurisdiction over non-member
11 Indians. This omission left the judicially determined limits on Tribal civil
12 jurisdiction intact.
13

14
15 The Supreme Court limited Tribal Court Civil Jurisdiction over
16 nonmembers to two, very limited circumstances. *Montana v. United States*,
17 450 U.S. 544, 101 S.Ct. 544, 67 L.Ed.2d 493 (1981)⁸ (Holding that the
18 Crow tribe cannot regulate hunting and fishing by non Indians on non
19 Indian fee land)
20

21
22 ⁸ The United States did not attempt to exhaust Tribal Court Remedies before
23 commencing it's action in Federal District Court

1 "This Court most recently reviewed the principles of inherent
2 sovereignty in *United States v. Wheeler*, 435 U. S. 313. In that case, noting
3 that Indian tribes are "unique aggregations possessing attributes of
4 sovereignty over both their members and their territory," *id.* at 435 U. S.
5 323, the Court upheld the power of a tribe to punish tribal members who
6 violate tribal criminal laws. But the Court was careful to note that, through
7 their original incorporation into the United States as well as through specific
8 treaties and statutes, the Indian tribes have lost many of the attributes of
9 sovereignty. *Id.* at 435 U. S. 326. The Court distinguished between those
10 inherent powers retained by the tribes and those divested:

11 "The areas in which such implicit divestiture of sovereignty has been held
12 to have occurred are those involving *the relations between an Indian tribe
13 and nonmembers of the tribe. . . .*"

14 "These limitations rest on the fact that the dependent status of Indian tribes
15 within our territorial jurisdiction is necessarily inconsistent with their
16 freedom independently *to determine their external relations*. But the powers
17 of self-government, including the power to prescribe and enforce internal
18 criminal laws, are of a different type. They involve *only the relations among
19 members of a tribe*. Thus, they are not such powers as would necessarily
20 be lost by virtue of a tribe's dependent status." *Ibid.* (Emphasis added.)

21 Thus, in addition to the power to punish tribal offenders, the Indian tribes
22 retain their inherent power to determine tribal membership, to regulate
23 domestic relations among members, and to prescribe rules of inheritance
24 for members. *Id.* at 435 U. S. 322, n. 18. But exercise of tribal power
25 beyond what is necessary to protect tribal self-government or to control
internal relations is inconsistent with the dependent status of the tribes, and
so cannot survive without express congressional delegation. "

Montana, 450 U. S. 563-564

21 "The Court recently applied these general principles in *Oliphant v.*
22 *Suquamish Indian Tribe*, 435 U. S. 191, rejecting a tribal claim of inherent
23 sovereign authority to exercise criminal jurisdiction over non-Indians.

24 Plaintiff's Brief Opposing Motion to Dismiss

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Stressing that Indian tribes cannot exercise power inconsistent with their diminished status as sovereigns, the Court quoted Justice Johnson's words in his concurrence in *10 U. S. 147 -- the first Indian case to reach this Court -- that the Indian tribes have lost any "right of governing every person within their limits except themselves."* 435 U.S. 209. Though Oliphant only determined inherent tribal authority in criminal matters, the principles on which it relied support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe. To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee, supra*, at 358 U. S. 223; 194 U. S. 152-154. A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."

Montana, 450 U.S. at 565

In *Strate v. A-1 Contractors*, 520 U.S. 438, 117 S.Ct. 1404, 137 L.Ed.2d 661 (1997), the Supreme Court held that tribes did not have jurisdiction over a civil suit between nonmembers (some Plaintiffs were members). Plaintiff had sued for damages incurred in a motor vehicle accident on a state highway within the reservation.

"Our case law establishes that, absent express authorization by federal statute or treaty, tribal jurisdiction over the conduct of nonmembers exists only in limited circumstances."

Plaintiff's Brief Opposing Motion to Dismiss

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1 *Strate*, 520 U.S. at

2
3 “*Montana* thus described a general rule that, absent a different
4 congressional direction, Indian tribes lack civil authority over the conduct of
5 nonmembers on non-Indian land within a reservation, subject to two
6 exceptions: The first exception relates to nonmembers who enter
7 consensual relationships with the tribe or its members; the second
8 concerns activity that directly affects the tribe’s political integrity,
9 economic security, health, or welfare.”

10 *Strate*, 520 U.S. at 446

11 Tribal Courts are not Courts of General Jurisdiction with respect to
12 activities of non-members; because a tribe’s inherent adjudicative
13 jurisdiction over non-members is at most only as broad as its legislative
14 jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 121 S.Ct. 2304, 15 L.Ed.2d
15 398 (2001) (Holding that the Fallon Paiute-Shoshone Tribe lacked
16 jurisdiction over civil suit against California State game wardens alleging
17 torts based on their execution of a state court search warrant on
18 reservation land).

19
20 Both *Strate* and *Hicks* gave illustrative examples of circumstances
21 included within the two *Montana* exceptions to the general rule that tribes
22 do not have civil jurisdiction over disputes involving non-members. These
23

24 Plaintiff’s Brief Opposing Motion to Dismiss

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1 examples did not include dissolution of a marriage between nonmembers;
2 nor did they include Domestic Violence Protection Orders involving
3 nonmembers – particularly when the acts are alleged to have occurred on
4 fee land.

5
6 “Hitherto, the absence of tribal ownership has been virtually
7 conclusive of the absence of tribal civil jurisdiction; with one minor
8 exception, we have never upheld under *Montana* the extension of tribal civil
9 authority over nonmembers on non-Indian land.”
10

11
12 *Hicks*, 533 U.S. at 360
13

14 The narrow scope of the two *Montana* exceptions was recently
15 clarified in *Plains Commerce Bank v. Long Family Land & Cattle Co., Inc.*,
16 544 U.S._____, ___ S.Ct._____, ___ L.Ed.2d___ (No. 07–411. Argued
17 April 14, 2008—Decided June 25, 2008)
18
19

20 “But tribes do not, as a general matter, possess authority over non-
21 Indians who come within their borders: “[T]he inherent sovereign powers of
22 an Indian tribe do not extend to the activities of nonmembers of the
23 tribe.” *Montana*, at 450 U. S., at 565. As we explained in *Oliphant v.*
Suquamish Tribe, 435 U. S. 191 (1978), the tribes have, by virtue of their

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1 incorporation into the American republic, lost “the right of governing . . .
2 person[s] within their limits except themselves.” *Id.*, at 209 (emphasis and
internal quotation marks omitted).

3 This general rule restricts tribal authority over nonmember activities
4 taking place on the reservation, and is particularly strong when the
5 nonmember’s activity occurs on land owned in fee simple by non-Indians—
6 what we have called “non-Indian fee land.” *Strate v. A-1 Contractors*,
520 U. S. 438, 446 (1997) (internal quotation marks
omitted)”

7 544 U.S. Slip opinion, page 9

8 “Given *Montana*’s “ ‘general proposition that the inherent sovereign
9 powers of an Indian tribe do not extend to the activities of nonmembers of
10 the tribe,’ ” *Atkinson, supra*, at 651 (quoting *Montana, supra*, at 565), efforts
11 by a tribe to regulate nonmembers, especially on non-Indian fee land,
12 are “presumptively invalid,” *Atkinson, supra*, at 659. The burden rests on
13 the tribe to establish one of the exceptions to *Montana*’s general rule that
14 would allow an extension of tribal authority to regulate nonmembers on
non-Indian fee land. *Atkinson*, 532 U. S., at 654. These exceptions are
“limited” ones, *id.*, at 647, and cannot be construed in a manner that would
“swallow the rule,” *id.*, at 655”

15 544 U.S. Slip opinion, page 11 (emphasis added)

16 “Tellingly, with only “one minor exception, we have never upheld
17 under *Montana* the extension of tribal civil authority over nonmembers on
18 *non-Indian land.*” *Hicks, supra*, at 360 (emphasis added).”

19 544 U.S. Slip opinion at page 14

20 “By virtue of their incorporation into the United States, the tribe’s
21 sovereign interests are now confined to managing tribal land, see
22 *Worcester*, 6 Pet., at 561 (persons are allowed to enter Indian land only
23 “with the assent of the [tribal members] themselves”), “protect[ing] tribal

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1 self-government,” and “control[ling] internal relations,” see *Montana, supra*,
2 at 564.”

3 544 U.S. Slip Opinion at page 16

4 As to the first *Montana* exception, the Court made clear that mere
5 entry onto a reservation and purchase of fee land within the reservation,
6 does not create a consensual relationship with the tribe.
7

8 “... nonmembers have no part in tribal government— they have no
9 say in the laws and regulations that govern tribal territory. Consequently,
10 those laws and regulations may be fairly imposed on nonmembers only if
11 the nonmember has consented, either expressly or by his actions. Even
12 then, the regulation must stem from the tribe’s inherent sovereign authority
13 to set conditions on entry, preserve tribal self-government, or control
14 internal relations. See *Montana*, 450 U. S., at 564.

15 In commenting on the policy goals Congress adopted with the
16 General Allotment Act, we noted that “[t]here is simply no suggestion” in the
17 history of the Act “that Congress intended that the non-Indians who would
18 settle upon alienated allotted lands would be subject to tribal regulatory
19 authority.” *Id.*, at 560, n. 9. In fact, we said it “defies common sense to
20 suppose” that Congress meant to subject non-Indians to tribal jurisdiction
21 simply by virtue of the nonmember’s purchase of land in fee simple. *Ibid.*”

22 544 U.S. Slip Opinion at page 18

23 “The second *Montana* exception stems from the same sovereign
24 interests that give rise to the first, interests that do not reach to regulating
25 the sale of non-Indian fee land. The second exception authorizes the tribe
26 to exercise civil jurisdiction when non-Indians’ “conduct” menaces the
27 “political integrity, the economic security, or the health or welfare of the
28 tribe.” *Montana*, 450 U. S., at 566. The conduct must do more than injure
29 the tribe, it must “imperil the subsistence” of the tribal community. *Ibid.* One
30 commentator has noted that “th[e] elevated threshold for application of the

31 Plaintiff’s Brief Opposing Motion to Dismiss

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1 second *Montana* exception suggests that tribal power must be necessary to
 2 avert catastrophic consequences.” Cohen §4.02[3][c], at 232, n. 220.”

3 544 U.S. Slip Opinion at page 22 - 23

4 The marital status of two nonmembers, including the disposition of
 5 their debts, property, cash flow, and custody of their children, is of no
 6 concern to the Suquamish tribe.⁹

7
 8 Whatever happened at the Martinez home on the morning of
 9 February 27, 2008, on fee land, involving two nonmembers. the alleged
 10 activity was not conduct that menaces the “political integrity, the economic
 11 security, or the health or welfare of the tribe.” Domestic Violence, even if it
 12 had occurred, did not “imperil the subsistence” of the tribal community.
 13
 14 Though Domestic Violence is a serious problem, adjudicating Ms. Martinez’
 15 allegations in tribal vs. state court is not necessary to “avert catastrophic
 16 consequences.”
 17

18
 19 ⁹ This case is distinguishable from *Saunders v. Robinson*, 864 F.2d 630
 20 (9th Cir. 1988); which held that a tribe and state have concurrent jurisdiction
 21 regarding custody of a minor tribal member. Arguably, that may be one of
 22 the rare examples of applicability of the second *Montana* exception. *Cf.*
 23 *Boozer v. Wilder*, 381 F.3d 931 (9th Cir., 2004)

1
2 **B. WHERE LACK OF SUBJECT MATTER JURISDICTION IS**
3 **CLEAR, PLAINTIFF IS NOT REQUIRED TO EXHAUST THE**
4 **JURISDICTIONAL DISPUTE IN TRIBAL COURT**

5
6 Defendants have moved to dismiss this case for failure to exhaust
7 tribal court remedies.

8 First, the remedy for failure to exhaust tribal court remedies is stay of
9 the federal court proceeding. As noted in *Strate, supra*

10
11 “(In *Iowa Mutual*) we remanded, as in *National Farmers*, for a
12 determination whether “the federal action should be stayed pending
13 further Tribal Court proceedings or dismissed.” 480 U. S.,
14 at 20, n. 14. The Court recognized in *Iowa Mutual* that the
15 exhaustion rule stated in *National Farmers* was “prudential,”
16 not jurisdictional. 480 U. S., at 20, n. 14; see also *id.*, at 16, n. 8 (stating
17 that “[e]xhaustion is required as a matter of comity, not as a jurisdictional
18 prerequisite”)”

19 *Strate*, 520 U.S. at 451

20 *National Farmers Union Insurance Cos. V. Crow Tribe.*, 471 U.S.
21 845, 105 S.Ct. 2447, 85 L.Ed2d 818 (1985) was decided post – *Oliphant*.
22 At that time, the Court declined to extend *Oliphant* to civil cases.

23 “Thus, we conclude that the answer to the question whether a tribal
24 court has the power to exercise civil subject matter jurisdiction over non-

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1 Indians in a case of this kind is not automatically foreclosed, as an
 2 extension of *Oliphant* would require.”

3 *National Farmers Union*, 471 U. S. 856

4 Though *National Farmers Union* was decided in 1985, it made no
 5 reference to *Montana v. U.S.*, decided four years earlier. Since *National*
 6 *Farmers*, the Supreme Court has repeatedly endorsed *U.S. v Montana* in
 7 *Strate*, *Hicks* and *Plains Commerce*. These subsequent rulings have
 8 foreclosed tribal court civil jurisdiction over nonmembers, two narrowly
 9 construed exceptions.

10 “When, as in this case, it is plain that no federal grant provides for
 11 tribal governance of nonmembers’ conduct on land covered by *Montana’s*
 12 main rule, it will be equally evident that tribal courts lack adjudicatory
 13 authority over disputes arising from such conduct. As in criminal
 14 proceedings, state or federal courts will be the only forums competent to
 15 adjudicate those disputes. See *National Farmers Union Ins. Cos. v. Crow*
 16 *Tribe*, 471 U. S. 845, 854 (1985). Therefore, when tribal-court jurisdiction
 17 over an action such as this one is challenged in federal court, the otherwise
 applicable exhaustion requirement, see *supra*, at 449–450, must give way,
 for it would serve no purpose other than delay. Cf. *National Farmers*, 471
 U. S., at 856, n. 21; *supra*, at 449, n. 7.”

18 *Strate*, 520 U.S. 458 Footnote 14

19 Though *Iowa Mutual Insurance Co. v. LaPlante*, 480 U.S. 9, 107 S.Ct.
 20 971, 94 L.Ed.2d 10 (1987) did mention *Montana v U.S.*, it did do so for a
 21 proposition that has since been rejected by *Plains Commerce Bank*:

22 “Tribal authority over the activities of non-Indians on reservation lands
 23 is an important part of tribal sovereignty. See *Montana v. United States*,

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1 450 U. S. 544, 450 U. S. 565-566 (1981); *Washington v. Confederated*
 2 *Tribes of Colville Indian Reservation*, 447 U. S. 134, 447 U. S. 152-153
 3 (1980); *Fisher v. District Court*, 424 U.S. at 424 U. S. 387-389. Civil
 4 jurisdiction over such activities presumptively lies in the tribal courts, unless
 5 affirmatively limited by a specific treaty provision or federal statute.”

6 *Iowa Mutual Insurance Co.*, 480 US at 18

7 “Given *Montana*’s “ ‘general proposition that the inherent sovereign
 8 powers of an Indian tribe do not extend to the activities of nonmembers of
 9 the tribe,’ ” *Atkinson, supra*, at 651 (quoting *Montana, supra*, at 565), efforts
 10 by a tribe to regulate nonmembers, especially on non-Indian fee land, are
 11 “presumptively invalid,” *Atkinson, supra*, at 659. The burden rests on the
 12 tribe to establish one of the exceptions to *Montana*’s general rule that
 13 would allow an extension of tribal authority to regulate nonmembers on
 14 non-Indian fee land. *Atkinson*, 532 U. S., at 654.

15 *Plains Commerce Bank*, 544 U.S. slip opinion at page 11

16 “In *National Farmers Union* we recognized exceptions to the
 17 exhaustion requirement, where “an assertion of tribal jurisdiction is
 18 motivated by a desire to harass or is conducted in bad faith, . . . or where
 19 the action is patently violative of express jurisdictional prohibitions, or
 20 where exhaustion would be futile because of the lack of an adequate
 21 opportunity to challenge the court’s jurisdiction,”
 22 *id.*, at 856, n. 21 (internal quotation marks omitted). None of these
 23 exceptions seems applicable to this case, but we added a broader
 24 exception in *Strate*: “[w]hen . . . it is plain that no federal grant provides for
 25 tribal governance of nonmembers’ conduct on land covered by *Montana*’s
 main rule,” so the exhaustion requirement “would serve no purpose
 other than delay.” 520 U. S., at 459–460, and n. 14.”

Nevada v. Hicks, 533 U.S. at 368

1 Because the Martinezes Divorce and the DV Protection Order clearly
 2 do not fall within the two narrowly construed *Montana* exceptions, the
 3 Suquamish Tribe has no colorable claim of jurisdiction. *Marceau v.*
 4 *Blackfeet Housing Authority*, 540 F.3d 916 is distinguishable, because the
 5 dispute was between tribal members and an entity created by the tribe,
 6 involving a contract performed on tribal land. Those facts made tribal
 7 jurisdiction over the dispute "unquestionably colorable. 540 F.3d 921 No
 8 such facts exist here.
 9

10
 11 Staying or dismissing this case for the Suquamish Tribal Court to
 12 deny our motions to dismiss would serve no purpose except delay.

13 **C. CHALLENGING TRIBAL COURT JURISDICTION IN**
 14 **SUQUAMISH TRIBAL COURT WOULD BE FUTILE**
 15

16 **As stated in *National Farmers Union***

17 "We do not suggest that exhaustion would be required where an
 18 assertion of tribal jurisdiction "is motivated by a desire to harass or is
 19 conducted in bad faith," *cf. Juidice v. Vail*, 430 U. S. 327, 430 U. S. 338
 20 (1977), or where the action is patently violative of express jurisdictional
 21 prohibitions, or where exhaustion would be futile because of the lack of an
 22 adequate opportunity to challenge the court's jurisdiction."

23 *National Farmers Union*, 471 U. S. 857, n. 22

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1 Given that the Suquamish Tribal Court has already ruled in other
 2 cases that it has civil jurisdiction over nonmembers, bringing a motion to
 3 dismiss the Martinez cases would be a waste of time; and only serve to
 4 delay a ruling on this issue at added expense to the parties.

5 This is especially the case, when the Chief Judge prevents counsel
 6 from obtaining a record of the DV protection Order hearing, because the
 7 "case is closed"; thereby preventing review of the record in order to bring a
 8 meaningful Motion for Relief, pursuant to FRCP 60, and depriving Mr.
 9 Martinez of valuable impeachment evidence.

10 **D. MR. MARTINEZ' APPEARANCE IN RESPONSE TO MS.**
 11 **MARTINEZ' PETITIONS DOES NOT CONSTITUTE "CONSENT"**
 12 **TO TRIBAL COURT JURISDICTION**

13 Defendants cite *Smith v. Salish Kootenai College*, 434 F.3d 1127 (9th
 14 Cir. 2006) for the proposition that Mr. Martinez' appearance and response
 15 to the Petitions constituted consent to Tribal Court Jurisdiction. Defendants
 16 misread *Smith*.

17 "The Court's recent cases, and our own experience with the *Montana*
 18 exceptions, demonstrate that there are two facts courts look to when
 19 considering a tribal court's civil jurisdiction over a case in which a
 20 nonmember is a party. First, and most important, is the party status of the
 21 nonmember; that is, whether the nonmember party is a plaintiff or a
 22 defendant. As Justice Souter observed in *Nevada v. Hicks*, "[i]t is the
 23 membership status of the unconsenting party, not the status of real
 24 property, that counts as the primary jurisdictional fact." 533 U.S. 353, 382,
 25 121 S.Ct. 2304, 150 L.Ed.2d 398 (2001) (Souter, J., concurring). The Court
 has repeatedly demonstrated its concern that tribal courts not require
 "defendants who are not tribal members" to "defend [themselves against

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1 ordinary claims] in an unfamiliar court." *Strate*, 520 U.S. at 442, 459, 117
2 S.Ct. 1404."

3 *Smith*, 434 F.3d at 1131

4 The *Smith* Court noted that

5 "where the nonmembers are *defendants*, the Court has thus far held
6 that the tribes lack jurisdiction, irrespective of whether the claims arose on
7 Indian lands. See *Hicks*, 533 U.S. at 356, 121 S.Ct. 2304 (claims arose on
8 Indian fee lands); *Montana*, 450 U.S. at 547, 101 S.Ct. 1245 (claims arose
9 on non-Indian lands within the reservation)."

10 434 F.3d at 1132

11 The *Smith* Court avoided that obstacle by treating Mr. Smith as a
12 Plaintiff; because the tribal court had realigned his crossclaim against the
13 co-defendant. This, more than Mr. Smith's mere appearance, swayed the
14 court. Because of *Smith's* procedural history, it should not be relied on to
15 infer consent to jurisdiction by Mr. Martinez.
16

17 Similarly, the unique facts in *Atwood v. Fort Peck Tribal Court*
18 *Assiniboine*, 513 F.3d 943 (9th Cir. 2008). *Atwood* relied on *Smith* for the
19 proposition that filing an action in Tribal court raises a "colorable" argument
20 for tribal court jurisdiction in a subsequent claim. However, in *Atwood*, (in
21 contrast to this case) the first action for custody was not dismissed (the
22
23

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1 non-indian father had agreed to the maternal aunt having custody of the
2 child); and the second action was for custody of the same child after the
3 mother died. Though not expressly stated, it appears that the child in
4 question was a tribal member.

5
6 The *dicta* in *Atwood*, if it ever was law, was refuted in *Plains*
7 *Commerce Bank*; which held that the Bank's prior request for a Notice to
8 Quit, from the Tribal Court, did not constitute consent to tribal court
9 jurisdiction for other claims. 544 U.S. Slip Opinion at page 24.

10
11 Defendants cite *Insurance Corp of Ireland, Ltd v. Compagnie des*
12 *Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 299 , __ L.Ed2d__
13 (!982) for the proposition that Plaintiff is barred from challenging jurisdiction
14 by *Res Judicata*. In that case, Defendants actually challenged jurisdiction.
15 Furthermore, the Court clearly stated that a defendant can waive *in*
16 *personam* jurisdiction by failing to challenge jurisdiction; but no actions of
17 the parties can confer subject matter jurisdiction.
18

19
20 **E. VAWA DOES NOT CONFER SUBJECT MATTER**
21 **JURISDICTION OVER NONMEMBERS TO TRIBAL COURTS**
22

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1 The Violence against Women Act, 18 U.S.C. 2265 requires state
2 courts to give full faith and credit to DV Protection Orders issued by Tribal
3 Courts. However, a condition of Full Faith and Credit is that the issuing
4 court had jurisdiction to issue the order. Nothing in VAWA conveys that
5 jurisdiction. VAWA provides:
6

7
8 “ (a) Full Faith and Credit. — Any protection order issued that is
9 consistent with subsection (b) of this section by the court of one State,
10 Indian tribe, or territory (the issuing State, Indian tribe, or territory) shall be
11 accorded full faith and credit by the court of another State, Indian tribe, or
12 territory (the enforcing State, Indian tribe, or territory) and enforced by the
13 court and law enforcement personnel of the other State, Indian tribal
14 government or Territory as if it were the order of the enforcing State or
15 tribe.

16
17 (b) Protection Order. — A protection order issued by a State, tribal, or
18 territorial court is consistent with this subsection if —

19 (1) such court has jurisdiction over the parties and matter under the
20 law of such State, Indian tribe, or territory;”
21

22 The statute expressly requires jurisdiction; which must be shown
23 before any order becomes enforceable under 18 USC sec., 2265. If
24 Congress intended to convey such jurisdiction, imposing such a
25 requirement would be superfluous.

Plaintiff acknowledges that 18 USC sec., 2265 does give a limited
grant of civil jurisdiction in section (e):

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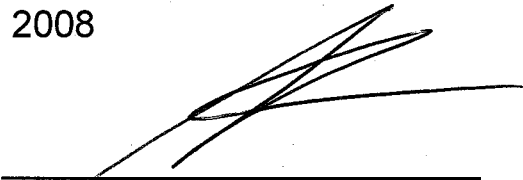
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1 "Tribal Court Jurisdiction. — For purposes of this section, a **tribal**
2 **court shall have full civil jurisdiction to enforce protection orders,**
3 including authority to enforce any orders through civil contempt
4 proceedings, exclusion of violators from Indian lands, and other appropriate
mechanisms, **in matters arising within the authority of the tribe.**"
(Emphasis added).

5 Section (e) permits enforcement , not issuance, of DV protection
6 Orders. This enables Tribal Courts to give Full Faith and Credit to orders
7 issued by state courts. Even this grant is limited only to matters "arising
8 within the authority of the tribe". If Congress intended to convey jurisdiction
9 to issue DV orders, it would have used the same language in subsection
10 (b) as it did in subsection (e).

11 Dated: December 5, 2008

12 
13 _____
14 STEVEN L. OLSEN
15 Attorney for Plaintiff
16 WSBA# 9601
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24 Plaintiff's Brief Opposing Motion to Dismiss

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